BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRANKLIN E. BALDWIN, JR. Claimant VS. **PAUL R. BRATON d/b/a PROFESSIONAL LAWN CARE SERVICES** Respondent AND **HARTFORD UNDERWRITERS INS. CO.** Insurance Carrier	)	Docket No. 1,024,450

ORDER

Respondent and its insurance carrier (respondent) requests review of the October 17, 2005, preliminary hearing Order entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The Administrative Law Judge (ALJ) found that respondent's contention that claimant violated safety requirements was not supported by the evidence and, accordingly, the claim is compensable.

Respondent appeals the ALJ's finding of compensability, claiming that respondent's safety rules were vigorously enforced and that claimant's willful violation and disregard for the rules caused his injury. Respondent asserts, therefore, that K.S.A. 44-501(d) precludes claimant's recovery in this case.

Claimant argues that he sustained a compensable injury. Claimant contends that he was following respondent's instructions when he climbed the tree without using a safety harness or rope, that there was no evidence he was acting willfully without yielding to reason in not using a safety harness or rope, and that respondent did not adequately train employees about nor rigidly enforce safety policies. Therefore, claimant requests that the ALJ's Order be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant had worked for respondent about three weeks pruning and removing trees at the time of his accident on July 1, 2005. Claimant had never worked as a tree trimmer before and did not receive any formal training from respondent on the proper way to climb a tree. Respondent loaned him a copy of *The Tree Climber's Companion*[1], a training manual for professional tree climbers. Claimant testified he had read about half the book before his accident. Claimant acknowledged that respondent talked with him about the importance of safety gear. Claimant stated that when he could use a harness, he did, but said there were times when the use of such gear was not practical.

When claimant started working for respondent, his supervisor was Tracy Copen. Mr. Copen, on a day-to-day basis, was the person in charge of the jobs claimant performed. He took directions from Mr. Copen concerning rigging and how to take down a tree. Mr. Copen knew about knots and how to rig the ropes on the tree branches to lower them. During the time he worked with Mr. Copen, claimant asked him questions on the proper way to climb trees, use a harness and use a safety hat. Claimant testified that in nearly all the jobs he worked with Mr. Copen, he climbed into the tree but that Mr. Copen did any work that required expertise.

Claimant testified that whenever Mr. Copen found him in a tree without a harness and rope, there would be discussions about using safety equipment. Claimant said Mr. Copen always used safety equipment. Respondent provided claimant with harness, ropes, hard hat, gloves and safety glasses. Claimant stated it was more Mr. Copen's policy that employees going up in a tree were supposed to have a harness, hard hat and ropes, and Paul Braton's policy was more about getting the work done.

Claimant testified that the day before the accident, he and some co-workers looked at the tree he was to remove, and the tree was dead. On the day of his accident, claimant and Mr. Braton talked about the job and decided to lean a ladder against the tree and cut the ends of the branches, then move the ladder nearer to the center of the tree and cut some more. In this way, they hoped to avoid damaging some nearby duplexes and rental properties. Claimant testified that because the tree was dead and rotted, had he been wearing a safety harness or lanyard, the branch would have come down on top of him. Claimant admitted that he was not wearing a hard hat at the time of his accident. He further admitted that he often did not wear a hard hat while in a tree because it would fall

[1] JEFF JEPSON, THE TREE CLIMBER'S COMPANION: A REFERENCE AND TRAINING MANUAL FOR PROFESSIONAL TREE CLIMBERS (2d ed. 2000) (Illustrated by Bryan Kotwica).

off and he would have to ask someone to return it to him or climb out of the tree and pick it up. Claimant was wearing safety glasses at the time he fell.

Juan Acezedo worked for respondent and was a witness to claimant's fall. He arrived at the job site at 8 a.m. When he got there, Mr. Braton was talking with claimant. Mr. Acezedo did not know what they were talking about, and Mr. Braton left before claimant climbed the tree. Mr. Acezedo was helping claimant with the ladder. He said claimant was in a 40-foot tree and was probably about 36 feet off the ground working with a chain saw. Claimant did not have a safety belt or safety harness on and was not wearing a hard hat. He did not have the chain saw hooked to anything. Mr. Acezedo testified that claimant was reaching out cutting a branch when the branch fell, hit the ladder, and claimant fell to the ground. Mr. Acezedo normally only worked mowing lawns and landscaping and had worked with claimant only one other time. And that time Mr. Copen had done the tree work and was wearing a safety harness and hard hat and was tied off. Mr. Acezedo did not wear a safety harness and lanyard, explaining that he did not need them because he worked on the ground. However, he said he likewise was not wearing a hard hat or safety goggles. Mr. Acezedo said he never wore a hard had or safety goggles.

Mr. Copen testified that he showed claimant how to use the safety harness and lanyard but did not teach him how to use the ropes to climb and maneuver, as he is not certified to teach. He showed claimant how to tie some knots. He always advised claimant to wear all safety equipment at every job but stated that claimant was stubborn and believed the safety equipment was a burden. There were times when he had to force claimant to use the equipment. Mr. Copen stated that respondent provided a safety harness for claimant, but claimant had a hard time keeping it around his waist because of his large size.

Mr. Copen testified that the night before the accident, claimant and Mr. Braton were talking about removing the tree. Mr. Copen heard Mr. Braton say that all claimant would have to do was put a ladder up and fold the limbs down on the tree. At that time, Mr. Copen testified he stated, "It will be one week before one of you guys are hurt or dead."[2] He then told respondent he was quitting and left. He returned to the job site the next morning to drop off some of respondent's equipment and pick up some of his own. Claimant had already started work when Mr. Copen arrived, and claimant was not wearing safety equipment. Mr. Copen was not at the site at the time of claimant's accident but testified it was obvious claimant had not been wearing his safety equipment because if he had, he would not have fallen.

Mr. Braton testified that respondent had a safety policy that required all workers to wear work boots, safety glasses, gloves and a hard hat at all times, even if only working on the ground. In addition, if working in a tree, workers were to wear a safety harness and

[2]Copen Depo. at 42.

lanyard. Ropes were used on an as-needed basis. This was not a written policy. Respondent provides all safety equipment to its employees except boots. Claimant was provided with gloves, sunglasses, hard hat, safety harness, safety lanyard and climbing rope. A safety harness is used to hold a body up in a tree so the person can use both hands with a chain saw. The harness takes about 20 to 30 seconds to put on. The safety lanyard is used after a person is in a tree to strap around a branch or other support. If a person slipped or lost his or her balance while wearing a safety lanyard, that person would fall less than a foot. The hard hat respondent provided claimant was the type that had a turn buckle on the back which would be used to tighten the hat to secure it to a head. Mr. Braton testified that he knew of at least one occasion when Mr. Copen enforced respondent's safety policy by forcing claimant to get out of a tree and put safety equipment on before being allowed to get back up in the tree.

Mr. Braton met with the claimant at the job site the evening before the accident. He and claimant went over how to prune a tree so the branches would not fall on the roof but did not discuss how claimant could tie off to the tree in question. On the date of the accident, claimant and two other employees were working at the job site.

It took Mr. Braton 22 minutes to get to the scene of the accident after being called. When he arrived, the ladder was still up in the tree. A branch that had been cut off the tree was lying on the ground. He asked claimant's co-workers if claimant had been wearing safety equipment and was told that claimant had not. Mr. Braton found claimant's safety hat sitting in the front of the truck. The safety belt and lanyard were inside a bag in the back of claimant's vehicle. It was Mr. Braton's opinion that if claimant had been wearing his safety equipment and the branch had hit the ladder, claimant would have been positioned in the tree and would not have fallen.

Mr. Braton testified that there was no reason claimant could not have used safety equipment the day of the accident. He denied that he and claimant had agreed that a climbing rope was not practical to use on this job. Mr. Braton did provide the ladder to claimant, but he stated that when using a ladder to ascend a tree, it is also necessary to wear a safety harness and lanyard. Mr. Braton, in looking at a photograph of the tree in question, named six different options of tying off safety equipment. Mr. Braton stated there would not be a time when it would not be practical to wear a safety harness and lanyard when cutting or pruning a tree.

Mr. Braton did not quiz claimant on the contents of *The Tree Climber's Companion* or ask him what chapters he had completed. Mr. Braton said that Mr. Copen had told him that claimant did not want to use the safety equipment. However, Mr. Braton testified that Mr. Copen never told him that claimant had problems wearing the safety harness because of his size.

James Thornton worked for respondent on the lawn side of the business. He never worked on the tree side with claimant. He stated that claimant had not received any formal

training on how to use a harness to climb trees, that claimant was never sent to school for any formal training. Since he did not work on the tree side of respondent's business, he did not know how much training Mr. Copen gave claimant. Mr. Thornton was not asked about what, if any, safety equipment he wore while working for respondent.

K.S.A. 44-501(d)(1) states:

> If the injury to the employee results . . . from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.
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> [T]he meaning of the word "willful," as used in the statute includes the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . "Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse." (Webster's New International Dictionary.)[3]

K.A.R. 51-20-1 states:

> The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

This case presents a close question. Clearly, respondent furnished claimant with safety equipment. Claimant was not wearing that safety equipment when he fell. It appears probable that if claimant had been wearing the hard hat, safety harness, lanyard and ropes, and if he had been properly tied to the tree, his injuries would have been reduced or perhaps prevented entirely. The obvious question is why was claimant not using the safety equipment and, more specifically, was his failure to do so "willful"? The answer to this question lies in large part on the answer to whether claimant had been properly trained in the use of the equipment and whether respondent made it clear that the safety equipment was to be worn at all times. It is apparent from the testimony of claimant's co-workers, Mr. Acezedo and Mr. Thornton, that the use of safety equipment was not enforced for workers who were working on the ground. Although claimant's supervisors, Mr. Braton and Mr. Copen, insist that the rule was strictly enforced when workers were off the ground and in the trees, this is not so clear. Furthermore, in this instance claimant believed that the tree was dead and too rotten to support his weight. As such, there was no part of the tree to tie onto, rendering the ropes, lanyard and safety harness useless. And claimant believed he was performing the job in the manner he had been instructed to do it by Mr. Braton.

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[3] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 85, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987) (quoting *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 [1920]).

Given the relatively brief period of time claimant worked for respondent, his lack of prior professional tree trimming experience, the limited amount of training he had received from respondent and the lack of supervision on the date of accident, the Board concludes that safety rules were not rigidly enforced by respondent and claimant's conduct was not willful. Accordingly, the Board agrees with the ALJ's finding that claimant's injuries were not the result of claimant's willful failure to use protection.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Robert H. Foerschler dated October 17, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2005.

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BOARD MEMBER

c: Samantha N. Benjamin, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director